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# YALE LAW JOURNAL

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Published monthly during the Academic year, by students of the Yale Law School.  
P. O. Address, Box 1342, New Haven, Conn.

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## EXTENT OF JUDICIAL POWER—INTERFERENCE WITH EXECUTIVE POWER.

The decision in the recent case of *La Abra Silver Mining Company v. United States*, 20 Sup.Ct. Rep. 168, finally determines a question which has been the source of no little diplomatic correspondence between the executive and legislative departments of our government during the past quarter of the century, and presenting one of the most outrageous claims ever worked through Congress.

The questions involved in this case arose from a claim made by the La Abra Silver Mining Company, a New York corporation, for damages alleged to have been sustained in consequence of certain acts and omissions of duty upon the part of official representatives of the Republic of Mexico. Pursuant to a convention between the United States and the Republic of Mexico, concluded in 1868, this claim was submitted to a commission of two for investigation. They, failing to agree, appointed an umpire, as provided by the terms of this convention, who made an award of close on to seven hundred thousand dollars in favor of the mining company. An application was made to the umpire by the Government of

Mexico for a rehearing of the case, but it was denied. Subsequently, the Mexican Government, without at all disputing its obligations under the convention of 1868—making such an award final—placed in the possession of the Secretary of State of the United States, certain books; documents and papers which it alleged had been then recently discovered and would show that the La Abra Company was not only fictitious and fraudulent, but had been supported by false and perjured testimony. At that time a large part of the sum awarded to the company had been paid by Mexico and was in the hands of the Secretary of State.

The President being of opinion that certain legislation was necessary as to the manner of making payments to the individual claimants, the matter was submitted to Congress. An act was passed, one portion of which directed the President to investigate the charges of fraud, and empowered him to withhold the funds, should he be of the opinion that the case ought to be retired. The Secretary of State subsequently made an investigation, and, after a thorough examination of the newly-discovered evidence, reported to the President that, "while the nature of the case did not justify or demand a retrial of the claims by a new international tribunal, the honor of the United States required that the case should be further investigated by the United States to ascertain whether this government had been made the means of enforcing against a friendly power claims of our citizens based upon or exaggerated by fraud; that if further investigation should remove the doubts, the honor of the United States would have been completely maintained, but if, on the other hand, the claimant should fail in removing these doubts, or if they should be replaced by certain condemnation, the honor of the United States would be vindicated by such measures as might then be dictated; and that as the Executive had not the means of instituting and pursuing the investigation, the subject should be referred to Congress for its action." Congress failed to make any provision, and after it adjourned in the summer of 1880, payment to the La Abra claimant of the installments received from Mexico, were begun by Executive order. This proceeded until the Arthur Administration, at which time further distribution was suspended because of the negotiation of a treaty between the United States and Mexico for a re-examination of the case. This treaty was signed in 1882 and was submitted to the Senate for its approval, but was rejected by that body. While this treaty was before the Senate mandamus proceedings were brought to compel the Secretary of State to distribute the installments which had been

withheld. The suit went to the Supreme Court on appeal and was dismissed by that tribunal. *Frelinghuysen v. Key*, 110 U. S. 63. After the rejection of the treaty, and after repeated recommendations to Congress by the Executive Department, an act was finally passed in 1892 conferring full jurisdiction over the matter upon the Court of Claims, with right of appeal to the Supreme Court of the United States, and authorizing the Attorney-General to bring suits in the name of the United States to determine whether the original award was obtained by fraud. The La Abra Company demurred to the bill brought for this purpose, the main ground being that the questions involved were of a diplomatic or political nature, and that under the Constitution of the United States the subject-matter of this suit was within the final and exclusive control of the Executive Department of the government and not within the jurisdiction of any judicial tribunal.

Article III, Section 2, of the Constitution provides for the extent of the judicial power, and declares that the same shall extend to all cases in law and equity arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority, etc. This article confines the judicial power to a "case in law or equity," in which a right under such law is asserted in a court of justice. If the question cannot be brought into a court, then there is no case in law or equity, and no jurisdiction is given in the Constitution.

Chief Justice Marshall, in the case of *Cohen v. Virginia*, 6 Wheat 264, declared a suit to be the prosecution by a party of some claim, demand, or request in a court of justice for the purpose of being put in possession of a *right* claimed by him and of which he is deprived. It is also decided in this case that if, in any controversy depending in a court, the cause should depend on the validity of a law, that would be a case arising under the Constitution, to which the judicial power of the United States would extend. In the case of *Osborn v. Bank of United States*, 9 Wheat 738, in referring to the judicial power, the court says, "This clause enables the judicial department to receive jurisdiction to the full extent of the Constitution, laws, and treaties of the United States, when any question respecting them shall assume such a form that the judicial power is capable of acting on it. That power is capable of acting only when the subject is submitted to it by a party who asserts his rights in the form prescribed by law. It then becomes a case, and the Constitution declares that the judicial power shall extend to all cases arising under the Constitution, laws and treaties of the United States."

There are matters involving public rights which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which Congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper. *Murray v. Land Co.*, 18 How. 272; *Smith v. Adams*, 130 U. S. 167.

The finding or conclusion reached by the Court of Claims, in a case presented to it, is not enforceable by any process of execution issuing from the court, nor does the statute establishing this court make it the final and indisputable basis of action for the other departments of government. The functions of this court are more in the nature of advisory. The Supreme Court has always been very reluctant in exercising its judicial power in reviewing decisions of this court, on an appeal, unless it was empowered to render a decision which was to be a final and indisputable basis of action by the parties and not simply ancillary or advisory. *Re Sanborn*, 148 U. S. 222.

In the present case the Supreme Court, after an examination of former adjudications on this subject, and being of the opinion that the proceedings involve a right which in its nature is susceptible of judicial determination, and also that the Act of Congress conferring jurisdiction authorizes the rendition of a final, conclusive determination, hold that the objections urged against its jurisdiction cannot be maintained and that the act in question is constitutional.

A short summary of the opinion may be stated as follows: That the tribunal awarding the damages dealt only with the two governments as such, having no relations whatsoever with the claimants; that no claims could be presented except through the intervention of the respective governments; that each government, when it entered into the compact under which the awards were made, relied on the honor and good faith of the other for protection so far as possible against frauds and impositions by the individual claimants; that the awards, when paid over, were in strict law the property of the United States, and that no claimant could assert or enforce any interest in it as long as the government withheld it from distribution; that when the La Abra Company asked the intervention of the United States it did so on the implied condition that it would act in entire good faith, and that if it should fail in this respect, it was incumbent upon the government to withhold any sum awarded; that as between the United States and the company, this fact was open to inquiry; that an investigation as to fraud is peculiarly judicial in its nature, and that in ascertaining the facts mate-

rial in such inquiry, no means are so effectual as those employed by or in a court of justice; that the act in question is to be taken as a recognition, so far as the United States is concerned, of the legal right of the company to receive the moneys in question, unless it appeared upon judicial investigation that fraud existed, thereby entitling the United States to withhold the same, and that the same presented a subject for judicial investigation in respect of which the parties assert *rights*—the United States insisting upon its rights, under the principles of international comity, to withhold moneys received by it under a treaty, on account of a certain claim presented through it before the commission organized under that treaty in the belief, superinduced by the claimant, that it was an honest demand; the claimant insisting upon its absolute legal right under the treaty and the award of the commission, independently of any question of fraud, to receive the money, and disputing the right of the United States upon any grounds to withhold the sum awarded.

SCHOOLS—DISCRIMINATION AGAINST COLORED CHILDREN—RIGHTS  
UNDER THE FOURTEENTH AMENDMENT.

In the case of *J. N. Cummings et al. v. County Board of Education, of Richmond County, State of Georgia*, reported in 20 Sup. Ct. Rep. 197, the United States Supreme Court sustains the decision of the Supreme Court of the State of Georgia in refusing to grant an injunction restraining the Board of Education from maintaining a high school for white children only and thereby discriminating against colored children. The facts were as follows: The School Board, for economic reasons, as alleged, temporarily suspended the Colored High School in Augusta, attended by about sixty pupils, in order, they claimed, that the funds thus saved might be diverted towards the education in the primary schools of about three hundred children of the same race. The parents of some of the negro children thus deprived of school privileges, brought suit to restrain the collecting of so much of the tax as related to the colored high schools, and to restrain the Board of Education from using any of said funds for the maintenance of the white high schools. In the decision by the Supreme Court, written by Justice Harlan, he says:

“We are not permitted by the evidence in the record to regard that decision as having been made with any desire or purpose on the part of the board to discriminate against any of the colored children of the county on account of their race. The State court did not deem the action of the Board of Education in suspending